ATTACHMENT A

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BROWN	FIFTH JUDICIAL CIRCUIT
JAMES VALLEY COOPERATIVE TELEPHONE COMPANY, a South Dakota cooperative; JAMES VALLEY COMMUNICATIONS, INC., a South Dakota corporation; and NORTHERN VALLEY COMMUNICATIONS, L.L.C., a South Dakota limited liability company, Plaintiffs, v. SOUTH DAKOTA NETWORK, LLC, a South Dakota limited liability company, Defendant.	**CIV. 15-134** **MEMORANDUM DECISION ON DEFENDANT'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STAY PROCEEDINGS AND REFER ISSUES TO THE FEDERAL COMMUNICATIONS COMMISSION AND MOTION TO STRIKE OR EXCLUDE THE OPINIONS OF WARREN FISCHER, MICHAEL STARKEY, AND BARRY BELL**

Defendant filed, *inter alia*, Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell. A motions hearing was held on April 12, 2017 in the above entitled matter. Prior to the hearing, both parties submitted briefs to the Court. This Memorandum Decision constitutes the Court's ruling on the motions.

BACKGROUND

Defendant South Dakota Network, LLC (SDN) is a telecommunication carrier that provides, among other things, "Centralized Equal Access" or "CEA" service in South Dakota. James Valley Cooperative Telephone Company (JVT) is a member of SDN. JVT is an incumbent local exchange carrier ("ILEC") that provided telephone services in Brown County. JVT owns James Valley Communications, Inc. (JVC), which is the sole member of Northern

Valley Communications, LLC (NVC). NVC is a competitive local exchange carrier ("CLEC") that provides telecommunications and information services in certain areas of Brown and Spink Counties in northeastern South Dakota. NVC claims affiliate membership in SDN by virtue of JVT's membership. Since 1999, NVC has utilized the CEA services of SDN pursuant to lease agreements and other contracts between NVC and SDN.

The dispute between the parties arises from AT&T's withholding payments to NVC and SDN for access charges starting in 2013. In September 2014, SDN entered into an agreement ("SDN/AT&T Agreement") with AT&T which provided for a contract rate to provide transport for certain telecommunications traffic.

In March of 2015, Plaintiffs filed the present suit against SDN, its managers, and CEO Mark Shlanta. The claims against the managers and Shlanta were subsequently dismissed by this Court pursuant to Defendants' Motions. As a result, the only defendant that remains in this suit is Defendant SDN. The complaint against SDN includes Count I breach of Operating Agreement, Count II breach of contracts, Count IV intentional interference with business relationship, Count V violation of South Dakota Trade Regulation SDCL 37-1-4; Count VI unjust enrichment, Count VII conversion, Count VIII dissolution, and Count IX declaratory judgment.

Defendant[1] moves to dismiss all of Plaintiffs' claims or alternatively stay the proceeding and refer some issues to the Federal Communications Commission. It claims all of Plaintiffs' claims arise under federal law and are preempted. Alternatively, Defendant argues that the FCC has primary jurisdiction and urges this Court to stay the proceeding and refer federal issues to the FCC. Defendant also moves to strike or exclude the opinions of Warren Fischer, Michael Starkey, and Barry Bell.

[1] Defendants made the present motions before this Court issued rulings dismissing claims against Managers. Since other defendants were dismissed from the present case, Defendant SDN became the only party making the motion.

ANALYSIS AND DECISION

I. Preemption

A. Legal Standard

State courts have authority to determine whether a state law cause of action is preempted by federal law. *Boomsma v. Dakota, Minnesota & E. R.R. Corp.*, 2002 S.D. 106, ¶ 13, 651 N.W.2d 238, 242. "There is a strong presumption against federal preemption." *In re Estate of Flaws*, 2016 S.D. 61, ¶ 17, 885 N.W.2d 580, 584. The party asserting preemption bears the burden to rebut that presumption. *Sunflour R.R., Inc. v. Paulson*, 2003 S.D. 122, ¶ 18, 670 N.W.2d 518, 523. (citing *Eldridge v. City of Greenwood,* 331 S.C. 398, 503 S.E.2d 191 (1998) with approval).

The framework for federal preemption is well settled. Generally, a state law claim may be preempted by federal law through express preemption or implied preemption. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015). Implied preemption includes field preemption and conflict preemption. *Id.* Field preemption applies when Congress intended to foreclose any state regulation in the *area,* irrespective of whether state law is consistent or inconsistent with federal standards. *Id.* (emphasis original). Conflict preemption, sometimes referred as ordinary preemption, "exists where 'compliance with both state and federal law is impossible', or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *California v. ARC America Corp.,* 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)); *Tiede v. CorTrust Bank, N.A.*, 2008 S.D. 31, ¶ 16, 748 N.W.2d 748, 753.

B. Federal Question Jurisdiction

To support its proposition of federal preemption, Defendant reasons that all of the claims in dispute invoke substantial federal questions. However, the mere existence of a federal question cannot be conflated with federal preemption defense. Generally, the preemptive effect of a federal statute does not provide federal question jurisdiction.[2] *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 2062 (2003); *see also, Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012) ("An assertion that a state claim is preempted by federal law 'is a *defense* to ... [the] state law claim and not a ground for federal jurisdiction.'") Either a state or federal court may entertain a federal preemption defense claim and dismiss the state law claim if preemption is warranted. *Carter v. Cent. Reg'l W. Virginia Airport Auth.*, No. 2:15-CV-13155, 2016 WL 4005932, at *16 (S.D.W. Va. July 25, 2016). Federal question jurisdiction, on the other hand, only renders a claim removable to a federal court. *See* 28 U.S.C. §1441 (articulating grounds for removal). The proper forum to address federal question jurisdiction is in a federal court on a removal and remand proceeding. *See* 28 U.S.C. §§ 1446-1447 (procedure for removal and remand). If a federal court exercises its jurisdiction, then it may decide whether claims are preempted. If a federal court declines jurisdiction and remands claims to state court, parties are free to raise a defense of federal preemption in state court. *See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014) (articulating the proper procedure for claiming federal preemption in a state court).

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[2] An exception to the general rule is the doctrine of complete preemption. *See Beneficial Nat. Bank*, 539 U.S. at 6, 123 S. Ct. at 2062. Complete preemption doctrine applies where the preemptive force of a federal statute is so "extraordinary" that it converts an ordinary state law claim into a federal claim and confers exclusive federal jurisdiction. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318 (1987); *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000). To that effect, complete preemption, in essence, is a jurisdictional doctrine rather than a preemption doctrine. *Dennis v. Hart,* 724 F.3d 1249, 1254 (9th Cir.2013). Because the parties agree that complete preemption does not apply to the FCA, this Court need not address this narrow exception.

Here, this Court has not received any notice of removal to federal court. Accordingly, this Court continues to exercise its concurrent jurisdiction, except for claims over which this Court lacks subject matter jurisdiction.

C. Artful Pleading Doctrine

Defendant emphatically argues that all of the claims raised by Plaintiffs are preempted under the artful pleading doctrine. Defendant's reading of the doctrine is overbroad. The artful pleading doctrine applies when the plaintiff has attempted to defeat removal by failing to plead a necessary federal question. *Chaganti & Associates, P.C. v. Nowotny*, 470 F.3d 1215, 1220 (8th Cir. 2006). The doctrine is applicable when federal law *completely* preempts a plaintiff's state law claim. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998) (emphasis added). Indeed, courts have held complete preemption is prerequisite to the artful pleading doctrine. *Minnesota ex rel. Hatch v. Worldcom, Inc.*, 125 F. Supp. 2d 365, 369 (D. Minn. 2000); *Chaganti*, 470 F.3d at1220–21 (refusing to apply the artful pleading doctrine because state law claim was not completely preempted); *Connolly v. Union Pac. R. Co.*, 453 F. Supp. 2d 1104, 1109 (E.D. Mo. 2006) ("The artful pleading doctrine is limited to federal statutes which 'so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal.'") Therefore, the artful pleading doctrine only applies in the context of complete preemption in support for removal proceeding. Because Defendant concedes that complete preemption does not apply in this case, the artful pleading doctrine is inapposite.

D. Ordinary Preemption under the FCA

With respect to the federal preemption defenses, Defendant concedes that only ordinary preemption applies. Accordingly, this Court does not address issues of express preemption and

field preemption. To determine whether a state law is preempted under ordinary preemption, the relevant test is "whether compliance with both laws is a 'physical impossibility,' or, whether the state law 'stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Tiede*, 2008 S.D. 31, ¶ 16, 748 N.W.2d at 753 (alteration original). The ultimate determining factor is Congressional intent. *Boomsma*, 2002 S.D. 106, ¶ 15, 651 N.W.2d at 242.

Under the conflict test, courts consider the theory of each claim and determine "whether the legal duty that is the predicate" of that claim is inconsistent with the federal regulations. *Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1075 (9th Cir. 2005), *aff'd,* 550 U.S. 45, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007). To determine whether a state law is an obstacle to a federal law, courts looks to "both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law's text, application, history, and interpretation." *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003).

Defendant cites §§ 201, 202 and 207 of the FCA to support its proposition for ordinary preemption. Section 201 declares unlawful any rates, terms, and conditions of telecommunication services that are not just and reasonable. *Boomer v. AT & T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002); 47 U.S.C. § 201. Section 202 prohibits unjust or unreasonable discrimination by a common carrier. 47 U.S.C. § 202. Most courts have held that the uniformity principle embodied in §§ 201 and 202 preempts state law challenges to the rates, terms, and conditions of telecommunication services. *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1197 and 1201 (10th Cir. 2010) (citing *In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 12 F.C.C. Rcd. 15014 (1997), and

deferring to the FCC's determination regarding the preemption effect of §§ 201 and 202 following detariffing); *Boomer*, 309 F.3d at 418; *but see Ting*, 319 F.3d at 1139 (holding uniformity principle no longer existed following detariffing). Section 207 creates federal causes of action and confers federal government exclusive jurisdiction for violation of §§ 201 and 202, and other duties imposed by the FCA (47 U.S.C. § 207), but it does not serve to exclude state remedies. *New York by Schneiderman v. Charter Commc'ns, Inc.*, No. 17 CIV. 1428 (CM), 2017 WL 1755958, at *5 (S.D.N.Y. Apr. 27, 2017).

Rather, § 414 of the FCA expressly preserves preexisting state remedies against carriers, such as tort, breach of contract, negligence, fraud, and misrepresentation. *In the Matter of Operator Servs. Providers of Am. Petition for Expedited Declaratory Ruling*, 6 F.C.C. Rcd. 4475 (F.C.C. 1991); 47 U.S.C. § 414. It preserves causes of action for breaches of duties distinguishable from those created under the FCA. *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 678 (8th Cir. 2009); *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992).

Defendant points to various allegations raised by Plaintiffs, including unlawfulness of the SDN/AT&T Agreement, unlawfulness of the cost study, and violations of tariffs. This Court acknowledges that it lacks subject matter jurisdiction over claims for violation of the FCA because the federal courts have exclusive jurisdiction to adjudicate these claims. However, lack of subject matter jurisdiction over these precise areas does not necessarily mean a state law claim must be dismissed.

E. Plaintiffs' Individual Claims

With the above principles in mind, this Court will address, in turn, each of the Plaintiff's state law claims.

1. Count I, Breach of Operating Agreement

Plaintiffs allege that Article 15 of the Operating Agreement required points of interconnection (POIs) to be established by agreement. Plaintiffs then allege Defendant's unilateral change of NVC's POI for AT&T traffic breached the Operating Agreement.

A breach of contract claim may be preempted by the FCA if the award or restitution of the contract claim would affect the rate, terms, and conditions of telecommunication service. *Ramette v. AT & T Corp.*, 351 Ill. App. 3d 73, 85, 812 N.E.2d 504, 513 (2004) (citing *Order on Reconsideration*, 12 F.C.C. Rep. at 15057). Conversely, a state law action that does not challenge the reasonableness of a rate, term or condition, (such as claims based on contract formation and breach of contract) is not preempted. *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845, at *10 (E.D. Mich. Sept. 18, 2007), *aff'd in part*, 310 Fed. Appx. 804 (6th Cir. 2009). Here, Plaintiffs' claim is based on breach of contract. The claim does not challenge the rate, terms and conditions of telecommunication service. The resolution of the state law claims of breach of the Operating Agreement is not dependent on any duty created by the FCA.

Defendant claims a predicate question to this claim is whether the Operating Agreement can limit the right of AT&T (which is not a party to the Operating Agreement) to request a different POI with a CLEC. However, the Operating Agreement does not prevent AT&T from requesting a different POI with a CLEC. The Operating Agreement only controls the conduct of the parties to that agreement. If a party to that agreement commits a breach it may properly be held responsible for that breach.

Defendant's contention that a dispute about POI should be resolved by a federal court or the FCC is an example of arguing for federal question jurisdiction as noted above. However, the issue for this Court is federal preemption, not federal question jurisdiction. *See, Wisconsin v.*

AT&T Corp., 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002) ("In the present context of a preemption argument, invocation of substantial federal issue jurisdiction would swallow the well-established rule that a conflict preemption defense does not support federal question jurisdiction.")

The obstruction prong does not support Defendant's proposition either. "Conflict preemption requires that the state or local action be a material impediment to the federal action, or thwart[ ] the federal policy in a material way." *Mount Olivet Cemetery Ass'n v. Salt Lake City,* 164 F.3d 480, 489 (10th Cir.1998) (alteration original). Here, allowing state law to enforce a contract between communication carriers cannot be said to be a material impediment, as the FCC expressly acknowledged that state law still governs formation and breach of a contract. *Interstate Interexchange Marketplace,* 12 F.C.C. Rep. at 15057.

In addition, enforcement of the alleged contractual duty would not frustrate the purpose of the FCA or obstruct the means chosen by Congress. Post detariffing, the market-based mechanism of the federal regulations seems to encourage, rather than prohibit contract-based relationships. Defendant argues that allowing this claim to proceed would frustrate the FCC's policy in promoting competition. However, it is undisputed that Defendant willingly entered into the Operating Agreement which Plaintiffs seek to enforce. Defendant does not provide sufficient explanation why enforcing such a voluntary agreement would be contrary to FCC policy. Defendant's conclusory statement that it has such effect is insufficient to meet its burden to rebut the presumption against preemption. Accordingly, Plaintiffs' breach of the Operating Agreement claim is not preempted by the FCA.

2. *Count II Breach of Contracts*

Likewise Plaintiffs' breach of contracts claim is not preempted. Regarding the breach of contracts claim, Plaintiffs' first theory is that the parties entered into a lease contract and that Defendant had an implied duty to refrain from interfering with NVC's ability to collect tariffed transport from long-distance carriers for transportation. Defendant argues such entitlement expectation or monopoly right would be in conflict with the FCC's policies. Defendant again does not sufficiently specify the policies announced by the FCC that would be inconsistent with enforcement of this contractual obligation.

Plaintiffs' second theory is that Defendant and NVC had contracts whereby Defendant agreed to provide services to NVC on the same terms and conditions as members. Under this theory, Defendant would have a contractual duty to treat NVC on equal footing as other members. Treating an affiliate like a member clearly does not violate § 202, which only prohibits unjust or unreasonable discrimination. The contractual duty, if proven, would demonstrate that Defendant voluntarily committed to a higher standard than the standard set forth in § 202. As such, that duty was created by a private contract, and is independent and distinguishable from the duty imposed by the FCA.

Under either theory, Plaintiffs do not challenge the rate, terms, and conditions of a telecommunication service agreement. The alleged contractual obligations do not frustrate the Congressional intent to promote competition either. "As in the context of ratemaking, where private contracts have replaced rigid rate prescriptions, state contract laws provide a background that is not only consistent with, but is integral to, the market-based mechanism of the federal regulations." *Metrophones*, 423 F.3d at 1076.

Defendant's argument that the contracts are subject to the control and regulation of the FCC is just another argument for federal question jurisdiction. Defendant further argues that allowing the breach of contracts claim will render the FCA meaningless, but does not offer any sufficient explanation to justify that claim. As such, Defendant has failed to meet its burden.

3. Count IV Intentional Interference with Business Relationship

To establish a claim for tortious interference with a business relationship, Plaintiffs must allege an intentional and unjustified act of interference on the part of the interferer. *Selle v. Tozser*, 2010 S.D. 64, ¶ 15, 786 N.W.2d 748, 753. Courts consider the following factors in determining whether an interferer's conduct is improper: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; and (6) the relations between the parties. *Id.*

To survive preemption, the act of interference must be independently wrongful and recognized by statute or common law as wrongful. *Zimmer Radio of Mid-Missouri, Inc. v. Lake Broad., Inc.*, 937 S.W.2d 402, 406 (Mo. Ct. App. 1997). A claim for interference with business relationship is preserved by the savings clause where the wrongful acts complained of constitute breaches of duties distinguishable from those created under the FCA. *Id.*

In *Harbor Broadcasting*, the plaintiff's complaint for tortious interference alleged that the defendant "failed and refused to take any steps whatsoever to comply with [an FCC order.] *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 562 (Minn. Ct. App. 2001). The appellate court found that evaluating the claim would necessarily require scrutinizing the FCC order. *Id.* at 567. The court concluded that the claim necessarily implicated

and intertwined technical concerns best left to the FCC. *Id.* The court also concluded the controversy arose from the defendant's failure to comply with the FCC order under which the parties' rights and duties are determined. *Id.* at 569. The court then held the claim was impliedly preempted by the FCA due to irreconcilable conflict with the FCC's exclusive jurisdiction, and rights and duties indistinguishable from those created under the FCA. *Id.* at 570.

In the instance case, however, the wrongfulness of Plaintiffs' act is not predicated on violations of the FCA. Plaintiffs claim that Defendant violated the contractual intentions of its members and their affiliates and the obligation of good faith and fair dealing by obtaining new contracts with AT&T and diverting revenues due to NVC to members of Defendant. Plaintiffs also claim Defendant's act is based on improper motives, such as obtaining a settlement payment from AT&T, receiving compensation for transport services that Defendant did not provide, and increasing revenue from cell-site backhaul service. Based on these allegations, the Plaintiffs do not need to assert that Defendant violated the duties imposed by the FCA to support their claim for intentional interference. The alleged breach is not based on any duties imposed by the FCA. Evaluating the Plaintiffs' claim does not require this Court to scrutinize the SDN/AT&T Agreement or tariffs filed with the FCC. This action is not preempted because the alleged wrongful acts are not premised on duties or obligations imposed by the FCA.

4. Count V Violation of South Dakota Trade Regulation SDCL 37-1-4

With respect to the antidiscrimination claim, Plaintiffs assert that Defendant engaged in unfair discrimination by offering AT&T a lower rate for transporting calls for the part of the state served by NVC, as compared to any other parts of the state. Plaintiff claims this was an attempt to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton. SDCL 37-1-4 prohibits unfair discrimination based on geographic locations for the

purpose of defeating or preventing competition. SDCL 37-1-3.5 exempts "noncompetitive and emerging competitive telecommunications service by public utilities pursuant to tariffs or schedules approved by the South Dakota Public Utilities Commission, or pursuant to any other federal or state regulatory authority..." The two state statutes read together show SDCL 37-1-4 regulates nonemerging competitive telecommunications service.

Section 202 prohibits unreasonable discrimination practices and services by a telecommunication carrier, including location based discrimination. 47 U.S.C. §202. The prohibition does not depend on whether a telecommunication service is provided pursuant to a filed tariff or a private contract. Thus, there is an overlapping area that SDCL 37-1-4 and § 202 both regulate—nonemerging competitive telecommunication service. Most courts have held the substantive antidiscrimination regulation in § 202 and related uniformity principle survived detariffing. *Universal Serv. Fund*, 619 F.3d at 1201 (surveying judicial and agency interpretation of § 202 both before and after detariffing); *cf. Ting*, 319 F.3d at1139 (holding § 202 survived detariffing but the filed rate doctrine or uniformity principle did not). Under either the majority or minority rule, a state regulation that imposes a different standard of antidiscrimination is in conflict with § 202. The standard of antidiscrimination under SDCL 37-1-4 clearly is inconsistent with the standard of "unreasonable discrimination." Therefore, Plaintiffs' claim for violation of SDCL 37-1-4 is preempted. Accordingly, Count V of Plaintiffs' claim is dismissed.

5. Count VI Unjust Enrichment

Plaintiffs' unjust enrichment claim alleges that Defendant collected payments from AT&T for transport services that were actually being provided by NVC. Accordingly, Plaintiffs claim Defendant would be unjustly enriched if it was allowed to retain those funds. Defendant

asks this court to follow the ruling in *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1010 (9th Cir. 2010).

Telesaurus is distinguishable. In *Telesaurus*, the court preempted a state law unjust enrichment claim based on § 332 of the FCA. *Id.* The Court held § 332 expressly preempted state authorities to regulate rates and market entry in commercial mobile radio service. *Id.* The court there reasoned that the state law allegations would require the court to substitute its judgment for the FCC's regarding a licensing decision, a regulation of market entry.

Unlike § 332, §§ 201 and 202 contain no express preemption provision. The savings clause expressly preserves preexisting state law remedies. 47 U.S.C. § 414. Under the conflict preemption analysis, Plaintiffs' assertion is not premised on a breach of duty imposed by the FCA. A review of the nature and elements of the unjust enrichment convinces this Court that adjudication of this claim does not require Plaintiffs to prove that the SDN/AT&T agreement was unlawful or Defendant committed any wrong doings. The elements for unjust enrichment only include: (1) defendant received a benefit, (2) defendant was aware it was receiving a benefit, and (3) that it is inequitable to allow defendant to retain this benefit without paying for it. *Stern Oil Co. v. Border States Paving, Inc.*, 2014 S.D. 28, ¶ 18, 848 N.W.2d 273, 279. The duty to return benefits unjustifiably received thus is independently created by the state law and is distinguishable from the duty created by the FCA. The claim for unjust enrichment is not preempted.

6. Count VII Conversion

Plaintiffs' conversion claim alleges that NVC and Defendant had a lease agreement for capacity between Sioux Falls and Groton, and Defendant converted that capacity for its own use and benefit.

The elements of conversion include: (1) plaintiff owned or had a possessory interest in the property; (2) plaintiff's interest in the property was greater than the defendant's; (3) defendant exercised dominion or control over or seriously interfered with plaintiff's interest in the property; and (4) such conduct deprived plaintiff of its interest in the property. *W. Consol. Co-op. v. Pew*, 2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 397.

Citing *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289 (1997), Defendant argues the conversion claim is actually a claim for breach under § 202. This claim is distinguishable from *Fetterman*. In *Fetterman*, the court found the core of appellant's complaint alleged interference with radio signal transmissions, an area § 333 of the FCA expressly regulated. *Id.* at 645, 689 A.2d at 292-293; 47 U.S.C. § 333. Here, however, Defendant cannot re-characterize Plaintiffs' conversion claim as a breach of duty under § 202. First, it is unclear whether the lease and use of the transport capacity are regulated exclusively by the federal government as Defendant does not cite specific authorities to support its proposition. Second, § 202 does not determine whether Plaintiffs' interest in the property was greater than Defendant's, or prohibit Defendant from interfering with Plaintiffs' interest in the property. Therefore, the duty allegedly breached under the conversion claim is independent and distinguishable from the duty created by § 202. The conversion claim is not preempted.

Defendant's argument that the lease itself created no exclusive right is a defense beyond the scope of federal preemption. Defendant further argues that determination of whether NVC's interests were greater than Defendant's and whether Defendant deprived NVC of its superior interest must be determined within the context of the federal regulatory scheme. That argument, like other arguments for federal question jurisdiction, does not control the issue at hand: whether the conversion claim is in conflict with the FCA and thus preempted. It is not.

7. Count VIII Dissolution

Plaintiffs seek judicial dissolution of Defendant based on two theories pursuant to SDCL 47-34A-801(a)(4). The statute provides grounds for judicial dissolution, *inter alia*:

> (iii) It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; or
>
> (iv) The managers or members in control of the company have acted, are acting, or will act in a manner that is illegal or fraudulent.

Plaintiffs concede dissolution on the ground of illegal or fraudulent conduct by managers predicates on violations of the FCA. Plaintiffs assert alternatively that it is no longer reasonably practicable to carry on Defendant's business in conformity with its Articles of Organization and Operating Agreement. Defendant does not argue this individual claim is preempted, but maintains that this Court should refer the issue of violations of the FCA to the FCC. That alternative claim is not preempted.

8. Count IX Declaratory Judgment

Both parties agree that declaratory judgment depends on the determination of substantive claims. Because the Court concluded that not all of Plaintiffs' claims are preempted, this claim is not preempted.

II. Primary Jurisdiction

A. Legal Standard

Having determined Plaintiffs' claims are not all preempted, this Court must decide whether the FCC has primary jurisdiction over the remaining claims as Defendant argues.

Primary jurisdiction questions arise when both an administrative agency and a court have authority to hear an initial dispute. *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 7, 706 N.W.2d 239, 242. This common law doctrine is used "to coordinate judicial and administrative decision making." *City of Osceola, Ark. v. Entergy Arkansas, Inc.*, 791 F.3d 904, 908–09 (8th

Cir. 2015) (quoting *Access Telecommunications v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)). This doctrine operates to allow a court to refer a case to the appropriate administrative agency for initial decision. *Id.* Application of this doctrine is sparse due to the potential expense and delay which may result. *Id.* Under this doctrine, a court may either stay proceedings or dismiss the case without prejudice. *Unigestion Holding, S.A. v. UPM Tech., Inc.*, No. 3:15-CV-185-SI, 2017 WL 2129302, at *8 (D. Or. May 16, 2017).

In determining whether an administrative agency has primary jurisdiction over an issue, no fixed formula is available. *City of Osceola, Ark*, 791 F.3d at 909. However, both parties rely on a four-factor test adopted by federal courts:

1. Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;

2. Whether the question at issue is particularly within the agency's discretion;

3. Whether there exists a substantial danger of inconsistent rulings; and

4. Whether a prior application has been made to the agency.

Advamtel, LLC v. Sprint Commc'ns Co., 105 F. Supp. 2d 476, 480 (E.D. Va. 2000).

Applying these factors, this Court concludes a complete referral is unnecessary. First, Adjudication of these state law claims is within the conventional experience of judges. This Court is qualified to decide contractual and tort claims, as well as equitable remedies. Second, determination of whether these state law duties or contractual duties are breached is not within the FCC's discretion. The factual disputes are not highly technical in nature. For example, one critical factual dispute is whether the parties had an agreement during the Groton meeting.

Another factual dispute is whether there was an agreement or arrangement that prohibited Defendant from using the same transport capacity that NVC leased.

On the other hand, the FCC has primary jurisdiction in determining whether Defendant violated the FCA. These issues include: the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. While determination of these federal issues is not a prerequisite to the state law claims, inviting the FCC to submit an *amicus* brief balances the judicial economies and utilizes the benefit of agency expertise and experience. As such, the parties may invite the FCC to provide opinions regarding these issues in the form of an *amicus* brief, if that agency is so inclined.

With respect to the dissolution claim, the parties appear to agree it should not proceed with other claims. Plaintiffs suggest bifurcation while Defendant argues for referral. Therefore, the claim for dissolution is bifurcated and stayed pending determination of other claims.

III. Expert Opinions

This Court next determines whether the opinions proffered by Warren Fischer, Michael Starkey, and Barry Bell must be stricken or excluded.

> Rule 702 governs the admissibility of expert testimony. SDCL 19-9-702.
>
> Under this rule, before a witness can testify as an expert, that witness must be "qualified." Furthermore, "[u]nder *Daubert,* the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge" as required under Rule 702. Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence.

Tosh v. Schwab, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428 (quoting *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402–03). Under Rule 702, this Court's function is to determine whether an expert testimony will "assist the trier of fact to

understand the evidence or to determine a fact in issue." *Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404 (quoting SDCL 19-15-2, predecessor of SDCL 19-19-702).

In this case, Defendant does not challenge the qualifications of Fischer, Starkey, and Bell. Defendant's major challenge to the opinions of Fischer and Starkey is that they prescribe legal standards to be applied to the facts of this case.

The opinions of Warren Fischer are based on a review of the 2014 cost study that was developed by Defendant in support of its interstate access rates. Fischer opines that Defendant overstated the rate charged for its CEA service in its tariff. Based on this finding, Fischer concluded that AT&T was charged below cost under the SDN/AT&T Agreement, and was subsidized by other interexchange carriers that paid the CEA tariff rate.

Fischer's opinions would prove that the 2014 cost study was unlawful, and that Defendant discriminated against other interexchange carriers, all in violation of the FCA. Because this Court lacks subject matter jurisdiction over claims for violations of the FCA, expert opinions regarding these issues would only serve to confuse the jury in its task of resolving the state law claims before this court. Accordingly, Fischer's opinions are excluded.

Michael Starkey provides opinions regarding the SDN/AT&T Agreement. He opines that (1) the SDN/AT&T Agreement was not a standard agreement typical of agreements in the telecommunication industry; (2) Defendant's provision of service between its Sioux Falls office and NVC's Groton end office is inconsistent with standard industry practice, its own documentation, as well as rules of the FCC; (3) Defendant's provision of services pursuant to the SDN/AT&T Agreement on an off-tariff basis was unlawful; (4) Defendant's CEO and managers should have been aware that offering an exclusive and off-tariff contract for tandem switching services was contrary to the rules of the FCC.

For the same reason discussed above, Starkey' opinions are excluded to the extent they conclude that the SDN/AT&T Agreement was unlawful and inconsistent with rules of the FCC. Starkey's opinion regarding duties of the CEO and manager is also excluded because it is no longer relevant since dismissal of claims against them. However, Starkey is allowed to testify other aspects of the SDN/AT&T Agreement and the telecommunication industry in general.

With respect to the opinions proffered by Barry Bell, Defendant argues that they are speculative because they are based on the amounts AT&T has refused to pay Plaintiffs for the transport of traffic from Sioux Falls to Groton. However, the mere existence of the dispute between AT&T and NVC does not make Bell's damages calculations speculative. Neither does Bell's assumption that Defendant would be liable render his opinions speculative. His opinions regarding damages are relevant to the case, and the weight and credibility to be assigned to such opinions are properly within the province of the jury. *See Johnson v. Schmitt*, 309 N.W.2d 838, 842 (S.D. 1981). Accordingly, Bell's expert opinions are not excluded.

CONCLUSION

Defendant's motion to dismiss is granted in part and denied in part. Specifically, the motion to dismiss Count V is granted; the motion to dismiss Count I, II, IV, VI, VII, VIII, and IX is denied. Defendant's alternative motion to stay and refer issues to the FCC is granted in part and denied in part. The motion to stay Count VIII is granted; the parties may invite the FCC for an *amicus* brief on the issues whether Defendant violated any provision of the FCA; the remaining motion is denied.

Defendant's motion to strike or exclude the opinions of Warren Fischer is granted; the motion to strike or exclude the opinions of Michael Starkey is granted in part, denied in part; and the motion to strike or exclude the opinions of Barry Bell is denied.

Counsel for Plaintiffs shall submit any necessary Orders to effectuate these decisions.

DATED this 7th day of July, 2017.

BY THE COURT:

Scott P. Myren
Circuit Judge

ATTEST:
Marla R. Zastrow, Clerk of Courts

By: _____, Deputy Clerk